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No. 04-1376

In the Supreme Court of the United States

HUMBERTO FERNANDEZ-VARGAS,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

For present purposes, the most important aspect of the government's response to the petition for a writ of certiorari is its conclusion: respondent, too, believes that this Court should grant the petition. See U.S. Br. 23. As the government acknowledges, the lower courts are irreconcilably split on the question presented—whether and under what circumstances INA § 241(a)(5) applies to an alien who reentered the United States illegally before the effective date of IIRIRA. In fact, the government admits that there are circuit splits as to each of the two stages of the retroactivity analysis this Court outlined in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). See U.S. Br. 8, 20. In addition, the government acknowledges that "the issue is an important and recurring one." U.S. Br. 7; see also *id.* at 22; Pet. 22-23. Thus, this Court's review is clearly appropriate.

Despite the government's acquiescence, certain aspects of its response warrant brief rejoinders.

1. Although the government acknowledges that the federal courts of appeals have divided over how to analyze the retroactivity of Section 241(a)(5) under each half of the *Landgraf* retroactivity analysis, the government suggests that this case might not be an appropriate vehicle to resolve the split under the second half of that analysis, where courts must determine whether the application of a statute in a specific instance would give that statute an impermissible "retroactive effect" (511 U.S. at 280). See U.S. Br. 21. This simply is not true.

As we explained in the petition (at 19-22), it would be inappropriately retroactive to apply Section 241(a)(5) to preclude discretionary relief to any alien who reentered the United States before the effective date of IIRIRA, April 1, 1997. By contrast, the government has always taken the position that there is no retroactivity problem with interpreting

Section 241(a)(5) to preclude the Attorney General from granting discretionary relief under any circumstance after that date. This case presents the Court with an ideal vehicle with which to choose between these two conflicting views of the retroactive applicability of Section 241(a)(5) to aliens that reentered the United States prior to the effective date of IIRIRA.

Admittedly, some courts have drawn lines between these two extremes—such as by holding that the statute cannot apply to an alien that had applied for relief before the effective date of IIRIRA,[1] or to an alien that had remarried before that date.[2] But nothing about these rulings in any way suggests that the Court cannot use this litigation to decide the fundamental question, which is whether Section 241(a)(5) can ***ever*** apply to bar discretionary relief to an alien who reentered the United States before April 1, 1997.[3]

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[1] See *Arevalo* v. *Ashcroft*, 344 F.3d 1, 14 (1st Cir. 2003); *Faiz-Mohammad* v. *Ashcroft*, 395 F.3d 799, 800 (7th Cir. 2005); *Sarmiento Cisneros* v. *U.S. Attorney General*, 381 F.3d 1277, 1284 (11th Cir. 2004).

[2] See *Alvarez-Portillo* v. *Ashcroft*, 280 F.3d 858, 861-862 (8th Cir. 2002).

[3] Of course, were this Court to reach the question and to hold, as the government urges, that merely reentering the United States was not sufficient to trigger retroactivity concerns, in a future case the Court could nonetheless determine that the statute did not apply to an alien who had done ***more*** than merely reenter the country—*i.e.*, to an alien who was married to an American citizen before the effective date of IIRIRA or who had applied for discretionary relief before that date. But the government has never in fact argued that the statute applies in either of these instances. Rather, the government has consistently taken the position that it creates no retroactivity problem to apply the statute to any alien who had not already obtained discretionary relief prior to the effective date of IIRIRA. We, of course, disagree—and this case presents an appropriate opportunity for the Court to resolve that disagreement.

In any event, there is no doubt that there is a profound circuit split on this very issue, with at least two circuits on each side of that split: in the Sixth and Ninth Circuits, Section 241(a)(5) does not apply to ***any*** alien who reentered the United States before the effective date of IIRIRA,[4] whereas in the Fourth and Tenth Circuits it apparently applies to ***all*** aliens who reentered prior to that date.[5] Thus, the fact that the remaining courts that have reached the second stage of a *Landgraf* retroactivity analysis may have adopted intermediate approaches in no way diminishes either the existence of the avowed circuit split or the appropriateness of this case as a vehicle for its resolution.

2. The government spends a surprising amount of time in its brief addressing the merits of the case. Of course, the appropriate time to cross swords on substance is not now, but after this Court grants review. In any event, the government's merits discussion is full of holes—as a few brief examples indicate.

a. The government fails in its attempt to rebut our explanation for why, under the first stage of the *Landgraf* analysis—in which courts are required to determine "whether Congress has expressly prescribed the statute's proper reach" (*Landgraf*, 511 U.S. at 280)—it is plain that Congress intended Section 241(a)(5) to operate only prospectively to those aliens who reentered the United States after IIRIRA's effective date. See Pet. 14-15.

In particular, as we explained (at 14), the prior version of the statute, INA § 242(f) (1994), contained a provision explicitly specifying that the statute should apply retroactively. Section 241(a)(5) does not contain such a provision—a dif-

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[4] See *Bejjani* v. *INS*, 271 F.3d 670 (6th Cir. 2001); *Castro-Cortez* v. *INS*, 239 F.3d 1037 (9th Cir. 2001).

[5] See *Velasquez-Gabriel* v. *Crocetti*, 263 F.3d 102 (4th Cir. 2001); Pet. App. 17a.

ference that, under the normal canons of statutory construction, must be given substantial weight. See Pet. 14-15.[6]

Similarly, the government does not deny that previous versions of the bill that became IIRIRA contained language that would have made Section 241(a)(5) explicitly retroactive—language that was omitted in the final version. See U.S. Br. 12 n.6. The government's effort to wish that language away is pretermitted by this Court's rule that "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987).

Finally, the government focuses on INA § 276, 8 U.S.C § 1326—which "establish[es the] crime of illegal re-entry following previous removal" (U.S. Br. 10)—to argue that because Section 276 criminalizes illegal reentry, Section 241(a)(5) cannot also be intended to regulate illegal reentry. U.S. Br. 10. But in fact ***both*** provisions are designed to increase the penalties for illegal reentry, in different ways. Per-

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[6] The government's argument that we have misinterpreted the prior version of the statute is baseless. According to the government, the prior statute expressly specified that orders of deportation should be reinstated whether or not the prior ***deportation*** predated the effective date of that statute. See U.S. Br. 11. That is a thoroughly implausible reading of the text: the phrase "after having previously departed from or been deported pursuant to an order of deportation" (INA § 242(f) (1994)) is clearly intended to limit the class of aliens that have "unlawfully reentered the United States" to which the statute applies, and thus the temporal restriction applies to that class as limited rather than to the time of the initial deportation. In any event, even if the government's interpretation of the statute were correct, the prior statute, unlike the current statute, would still necessarily have ***explicitly*** applied retroactively to aliens who, after previously being deported, reentered illegally before the statute's effective date.

haps the best evidence for this is the fact that both provisions were amended by Section 305 of IIRIRA—Section 305(a)(3) codified the new INA § 241(a)(5), and Section 305(b) amended INA § 276. Moreover, both address the consequences of illegal reentry, which as a result sis the "'activity the statute was intended to regulate.'" U.S. Br. 10 (quoting *Martin* v. *Hadix*, 527 U.S. 343, 363 (1999) (Scalia, J., concurring in part and concurring in the judgment)).

b. The government's argument about the correct way to analyze Section 241(a)(5) under the first stage of a *Landgraf* retroactivity inquiry also simply ignores our lengthy explanation of why the lower court erred by relying on a non-existent presumption ***against*** prospectivity in conducting that inquiry. See Pet. 16-18.

As we noted, in *Lindh* v. *Murphy*, 521 U.S. 320 (1997), the Court found that the amendments made to 28 U.S.C. § 2254 by the Antiterrorism and Effective Death Penalty Act of 1996, ("AEDPA"), Pub. L. No. 104–132, 110 Stat. 1214 (1996), apply only prospectively under the first step of a *Landgraf* analysis, despite some conflicting evidence as to Congress's intent on the question. Here, too, there is some conflicting evidence about the issue, but using the ordinary tools of statutory construction, as a court must (*Lindh*, 521 U.S. at 326), the best interpretation of the statute is that Congress intended it to apply only prospectively. See Pet. 14-15.

The government ducks this argument, instead responding only by quibbling with our discussion of the specific evidence demonstrating Congress's intent that the statute apply only prospectively. See U.S. Br. 9-13. Not only are these quibbles without merit (see pages 3-5, *supra*), but more importantly we have never claimed that the evidence is overwhelming or that it uniformly supports our position. Rather, like in *Lindh*, although the evidence may not "speak to the present issue with flawless clarity" (*Lindh*, 521 U.S. at 332), our position "accords more coherence" (*id.* at 336) to the

statute than any other. As this Court has explained, "[t]hat is enough." *Ibid.* Surprisingly, the government never even mentions *Lindh* in its brief, despite our reliance on the case.

c. The government's analysis of whether applying Section 241(a)(5) to bar discretionary relief would be impermissibly retroactive under stage two of a *Landgraf* inquiry is as flawed as its analysis under the first stage of that inquiry. For example, the government argues that Section 241(a)(5) does not have retroactive effect because "the immigration laws have long proscribed—and made criminal—an illegal reentry by an alien who was previously ordered removed." U.S. Br. 15. But this ignores *INS* v. *St. Cyr*, 533 U.S. 289 (2001), in which this Court held that it would give an impermissibly retroactive effect to another provision of IIRIRA to apply the statute to alter the consequences of an already-illegal act. The government's effort to suggest that *St. Cyr* in fact supports the lower court's decision (see U.S. Br. 16-17) is unsuccessful. In each instance, IIRIRA alters the consequences of an underlying criminal act—in that case, an aggravated felony, in this case, illegal reentry. Just as it would have given IIRIRA an impermissibly retroactive effect to apply the statute to change the consequences of a guilty plea to an aggravated felony, so too would it give the statute an impermissibly retroactive effect to use it to preclude an alien who had illegally reentered prior to the effective date of IIRIRA from applying for discretionary relief.

Similarly, the government's argument that Section 241(a)(5)'s bar against discretionary relief is merely a change in procedural rules, and thus should not be viewed to have an impermissibly retroactive effect (see U.S. Br. 18-19), ignores reality. It is undisputed that "under [the] prior statutory regime for illegal reentry, [an alien's] marriage would have made him ***a likely candidate*** for adjustment of status to lawful permanent resident, though such relief was within the discretion of the Attorney General" (*Alvarez-Portillo*, 280 F.3d at 862 (emphasis added)), whereas after IIRIRA that alien

may not even apply for such relief. The government's argument also disregards this Court's explanation that "[t]here is a clear difference, for the purposes of retroactivity analysis, between facing ***possible*** deportation and facing ***certain*** deportation." *St. Cyr*, 533 U.S. at 325 (emphasis added). Thus, applying Section 241(a)(5) to preclude aliens from seeking discretionary relief from deportation would give the statute an impermissibly retroactive effect.

Regardless of the merits of the government's interpretation of Section 241(a)(5) under either stage of the *Landgraf* retroactivity analysis, the real point for present purposes is that—as both petitioner and the government agree—this Court should grant review and use this case to decide whether Section 241(a)(5) applies to aliens who reentered the United States prior to the effective date of IIRIRA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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